United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

730

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,470

CHARLES B. JONES, et al

Appellees

v.

JOHN D. NEWTON

Appellant

Appeal From the United States District Court for the District of Columbia

BRIEF FOR APPELLANT

and appendix

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UNITED STATES COURT OF APPEALS

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BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED*

Was the medical testimony legally sufficient to show a causal relationship between the accident and the treatment that the male plaintiff subsequently received?

Was the verdict grossly excessive and against the weight of the evidence and the result of prejudice against and sympathy for the

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*This case has not previously been before this court.

plaintiffs resulting from improper remarks and argument of counsel for the plaintiffs?

STATEMENT OF THE CASE

This is an appeal from a judgment on a jury verdict entered in favor of the male plaintiff for personal injuries alleged to have been incurred in an automobile accident on September 25, 1965, in the sum of $25,000.00, and in favor of the female plaintiff in the sum of $5,000.00 for loss of consortium.

During voir dire counsel for the plaintiffs inquired if any of the prospective jury panel had ever made claims for personal injury and the disposition of those claims. Upon being advised that those members of the panel who had previous accidents either filed no claims, because there was no insurance, or settled their claims with the insurance company prior to trial or the institution of litigation, counsel for the plaintiffs asked the panel ". . .is there or do you feel that where a person is injured and does file suit that perhaps this is a situation which is unconscionable and that a person should not file suit and should settle outside? . . .I take it by your silence that all you ladies and gentlemen recognize that every individual has a right under the law to come before a jury. . .that he is not required under the law to accept what the other person may offer by way of settlement. ." (T. 6).

As the voir dire by counsel for the plaintiffs continued he suggested to the jury panel that if he was sitting in their position he would be prejudiced against persons operating a 1964 Corvette sports car and counsel went on to testify that it is generally recognized that there is a certain amount of bias against people with sports car (T. 8, 9).

Counsel for the defendant objected to this line of questioning and moved that the panel be stricken and a new jury impanelled. This motion was denied by the Court (T. 13, 14).

The male plaintiff testified that in 1955 while in college he slipped on snow and injured his right wrist. Approximately a year later a knot developed on the wrist (T. 29). At the time of the present accident he again injured his right wrist (T. 35). However, he was able to continue on to the Washington Sanitarium and Hospital where he performed a blood transfusion for a child (T. 36). During that evening his wrist began to pain him and the following days the pain increased and he soaked it but received no relief. Approximately two weeks after the accident he sought medical attention at the attending physician's office at Walter Reed Army Hospital (T. 38, 58). At that time his wrist was strapped and he was referred to the Orthopaedic Clinic at that hospital. Approximately six weeks later, or about two months after the accident, an operation was performed at Walter Reed under a local anesthetic and the knot or ganglion that had been present on his wrist since 1955, or ten years prior to the instant accident, was removed (T. 38, 39). Thereafter, his right wrist was in a cast for six weeks and within a matter of a couple of weeks after the operation he was able to do some manipulation of his fingers (T. 40). When the cast was removed he reinjured the same wrist, while reaching for a door which swung open and bent his wrist. On another occasion his wife grasped and twisted his hand and again reinjured it, and on still other occasions it was again reinjured while playing with neighborhood children (T. 42, 43).

In February, 1969, three and one-half years after the accident, he again slipped on the snow and fell on this wrist (T. 61, 71). At the present time, he testified, he only had pain periodically every three or five months. His only restriction in the use of the wrist is self imposed, in that he does not play basketball as he once did because he feels he may reinjure his wrist (T. 44, 45).

He further testified that the only time he missed from his employment was the day on which he was operated on and the two days following this surgery, as well as several hours that he was required to take off in order to visit the Orthopaedic Clinic and X-ray Clinic (T. 41). He also testified that in March, 1969, approximately a month after he slipped on the snow for the second time, he was sent to Dr. O. Anderson Engh by his attorney (T. 61).

Dr. O. Anderson Engh was called as the plaintiffs' medical witness and testified that he saw the plaintiff on one occasion on March 6, 1969 (T. 101); that it was his opinion that the surgery which the male plaintiff underwent at Walter Reed Hospital for removal of the ganglion on the right wrist had nothing to do with his automobile accident and was not a result of that accident, and that the "ganglion is a red herring" in this case (T. 108-112). He felt that the plaintiff sustained a strain involving the right wrist due to involvement of the triangular disc (T. 102). This diagnosis was arrived at by means of the history that was given him by the plaintiff, as well as his examination of the wrist and an examination of the X-rays which he took (T. 114). He testified that the X-rays showed a normal wrist, no fractures, no dislocation, no arthritis (T. 106, 107). Further, that his physical examination of the wrist was also negative, except that when the wrist was flexed beyond a certain point the plaintiff complained of soreness (T. 114, 115). He stated that the history given him by the plaintiff was that the plaintiff injured his wrist in 1955 when he slipped on the snow while a student at college, and that thereafter the ganglion developed but that the plaintiff had no difficulty with the wrist until following the accident of September 1965.

Dr. Engh testified, on cross-examination, that the plaintiff never told him of the subsequent injuries to his wrist which occurred during the three and one-half years between the automobile accident of

September, 1965, and his examination in March, 1969 (T. 112), nor did he know nor was he told that less than one month prior to his examination of March 1969, that the plaintiff had again slipped on the snow and fell on the same wrist (T. 112). The doctor further testified that no treatment was presently required and that surgery would not be satisfactory; that the plaintiff's condition is permanent and will not change. But nowhere did he say what the condition was that was permanent (T. 104, 107).

The plaintiff read in evidence two portions of the Walter Reed Army Hospital's records of the plaintiff. The first portion reads as follows:

> "October 5, 1965.
>
> "Twenty-seven years old, white, male with chronic low back pain. Last orthopedic evaluation 1963. Pain aggravated by auto accident ten days ago. Also right wrist mass coming and going over past nine years aggravated by trauma and flexing of wrist.
>
> "Examination. Lumbar sacro-iliac remarkable only for tenderness. Range of motion, full. However, right wrist ganglia. A firm non-tender mass has formed on dorsal almost in the center of small bones of wrist.
>
> "Impression Number 1. Ganglia right wrist. 2. Left sacro-iliac sprain from two degress short left leg. Disposition referred to orthopedic clinic for X-ray.
>
> "Number 1. Right wrist sprain. Number 2. Lumbar sacro-iliac.
>
> "12 October '65. Orthopedic Department, Hospital Clinic. See daily consultation sheet. 14 October '65. Orthopedic pre-operative conference asked for excision ganglia right wrist within two weeks." (T. 98)

The second portion of the record read in evidence read as follows:

> "History of present illness. Patient is a 28-year-old M.D. pathological resident of Walter Reed General Hospital. He was involved in an automobile accident six weeks ago. Since that time he has intermittent period of tenderness and pain and the right wrist especially on inflexion. A firm non-tender mass has developed on the dorsal section of his right wrist. This was seen by an orthopedist here and was presented to pre-operative conference and accepted for gangliectomy. He is admitted at this time for this procedure." (T. 99)

The female plaintiff testified that she and the male plaintiff were married on August 14, 1965, five weeks prior to the accident (T. 120); that the injuries allegedly sustained in the automobile accident interferred with their marital relationship during the time he had the cast on (T. 127); that in the fall following the accident the male plaintiff didn't sail his sail boat, didn't golf, didn't play tennis and didn't roughhouse with the neighborhood children (T. 124). By the spring following the accident they were able to sail; however, they were unable to resume their golf lessons until the spring of 1967 (T. 126), and, further, on some occasions while attending a movie theatre she would attempt to grasp his hand he he would pull away (T. 125).

Officer Walter Wiseman of the Traffic Division of the Metropolitan Police Department, testified, over objection, (T. 75) that the plaintiffs' exhibit No. 1 is the rough notes prepared by the officer that investigated an accident and he also testified concerning the meaning of certain symbols (T. 82-86).

In closing argument, counsel for the plaintiffs suggested to the jury, in interrogatory form, that the injuries to the male plaintiff were worth $1,000.00 a year and suggested other monetary sums (T. 171). Counsel also suggested to the jury that the male plaintiff

would be prevented in the future from enjoying the companionship of his children; would not be able to toss them up in the air, etc. Counsel also dangled in front of the jury plaintiff's exhibit No. 1 (T. 196) (the police officer's rough notes) which the Court previously had stricken from the evidence (T. 92), stating to the jury that because of certain legal reasons they were not permitted to see it (T. 196).

SUMMARY OF ARGUMENT

I.

The medical testimony was legally insufficient to prove that the surgery that the male plaintiff underwent and his subsequent disability following that surgery was proximately caused by reason of the accident in which he was involved with the defendant. Further, the medical testimony was legally insufficient to establish that the male plaintiff incurred any permanent injury as a result of the accident with the defendant.

II.

The verdicts for the plaintiffs were grossly excessive and against the weight of the evidence.

III.

The verdict for the plaintiffs is the result of prejudice against the defendant and sympathy for the plaintiff's resulting from improper remarks and arguments by counsel for the plaintiffs.

ARGUMENT

I.

The trial Court is empowered to grant a new trial on the grounds that the verdict is against the weight of the evidence; that the damages are excessive or for any other reason that the Court

feels that the trial was not fair to the moving party. *Montgomery Ward & Company v. Duncan*, 311 U.S. 243, 251; 61 S.Ct. 189; 85 L.Ed. 147 (1940).

"On such a motion, it is the duty of the judge to set aside the verdict and grant a new trial if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Aetna Casualty & Surety Company v. Yeatts*, (C.C.A. 4th Cir. 1941), 122 F.2d 350, pp. 352, 353.

It is patently clear that there is absolutely no evidence in the present case to support a finding that there was any substantial injuries to the plaintiffs as a result of this automobile accident. The two areas of his body which the male plaintiff alleged were injured by reason of this accident were his right wrist and his low back. The testimony is undisputed that the low back had been previously injured and that he had no further difficulty with that after a couple of months of discomfort and that the only treatment was the performance of certain exercises.

With respect to the right wrist, the male plaintiff testified that this was injured ten years prior to this automobile accident and that the following that first injury, a cyst or mass developed on this wrist; that following the instant automobile accident he had pain in this same wrist and that the ganglion or mass which had been present for ten years prior to the accident was surgically removed.

There is absolutely no medical testimony that the surgery for the removal of the ganglion had anything to do with any injury he sustained in the automobile accident. There is nothing in the hospital records read in evidence to support such a finding. In fact, the only medical evidence was that of Dr. Engh and he stated without

hesitation that it was his opinion that the surgery was not as a result of any condition caused by the accident.

Counsel for the plaintiff elicited from the male plaintiff, over objection, the fact that the average age of a physician at Walter Reed Hospital is the early thirties, thereby suggesting and later arguing to the jury that the doctors at Walter Reed were inexperienced and made an improper diagnosis. This certainly was improper and irrelevant. Further, if that be so, then this defendant certainly is not responsible for these damages for if the doctors did make an improper diagnosis their negligence was an independent intervening cause over which this defendant had no control and which he could not reasonably have foreseen. In effect, the plaintiff wants to have his cake and eat it for he alleges that he aggravated a previous injury to his wrist and then says that when the doctors at Walter Reed operated to alleviate this so-called aggravation they acted improperly because Dr. Engh says in his opinion there was no aggravation but that the plaintiff received a new and different injury to the right wrist in the area of the triangular disc.

It is respectfully submitted, first, that there was absolutely no evidence that any prior condition of the male plaintiff's wrist was aggravated by this automobile accident and for the jury so to find would mean that they were engaging in nothing but pure specualtion. In order to find that there was an aggravation of a pre-existing condition there must be substantial medical testimony for it is an issue that requires the opinion of an expert regarding the causal connection between a prior condition and subsequent treatment. This causal relationship cannot be inferred from the mere happening of an accident and the subsequent surgery. The Walter Reed Army Hospital records certainly did not say there was any causal relationship and Dr. Engh positively disclaimed any causal relationship. Since there was no medical testimony to prove that the surgery that the male

plaintiff underwent subsequent to the accident was causally related to any injuries received in the accident, the jury could not find that the surgery was the result of any condition that arose out of or was aggravated by this accident, and a finding on their part to that effect would be clearly erroneous and contrary to the evidence, contrary to the law, contrary to the weight of the evidence and not supported by any evidence.

Second, the only medical testimony was that of Dr. Engh and he testified that the surgery was not as a result of the automobile accident. This testimony was produced by the plaintiff himself and he is bound by it. Therefore, not only was there absolutely no evidence of showing any causal relationship but there was positive uncontradicted evidence produced by the plaintiff himself that the automobile accident did not aggravate any prior condition and did not necessitate the surgery that he subsequently underwent nor did it cause the subsequent disability he complained of by reason of having his wrist in a cast.

Dr. Engh testified that it was his opinion that the plaintiff sustained an injury to the triangular disc as a result of this automobile accident, and that this injury was permanent. This opinion is completely without foundation in fact and, therefore, insufficient to support a jury finding to that effect.

Dr. Engh further testified that three aids were used by him in order to arrive at his opinion. The first was the history given by the plaintiff to him, the second, the X-rays of the plaintiff's wrist which he took, and the third, his physical examination of his wrist. With respect to the X-rays, he testified that they showed a normal wrist with no evidence of any injury whatsoever. With respect to the physical examination, he testified that the only objective sign of injury that he found was an exclamation of pain or soreness by the plaintiff when the doctor in the course of his manipulation bent the

wrist beyond a certain point. Therefore, it is obvious that the opinion was based primarily upon the history that was given to Dr. Engh and that consisted solely of the fact that the male plaintiff had injured his wrist in 1955, that ganglion thereafter developed and that he injured his wrist in the automobile accident in September of 1965.

Dr. Engh admitted on cross-examination that a history was very important to him in arriving at his opinion and that at the time this history was given him by the plaintiff he was not told by the plaintiff that the plaintiff had reinjured his wrist on several occasions since the automobile accident in September 1965, and as recently as one month before his examination in March of 1969.

Under these circumstances, it is absolutely preposterous for a doctor to say that based upon reasonable medical certitude that the injury, if any, that the plaintiff sustained to his right wrist was caused as a result of an automobile accident three and one-half years prior to his examination rather than to a fall that occurred less than one month prior to this examination or because of any other number of accidents that occurred to this wrist between September of 1965 and March of 1969. Dr. Engh's opinion is preposterous on its face and worthy of no credibility whatsoever. It must, as a matter of law, be disregarded as unsupported in fact. This is particularly true when the other diagnostic aids used by him, i.e., the X-rays and physical examination, revealed little, if any, injury. It is a matter of common knowledge that pain will be elicited even when a healthy wrist is bent beyond the limits of its flexion.

It is respectfully submitted that an analysis of the facts upon which the opinion of Dr. Engh is based that the plaintiff sustained a permanent injury to his wrist as a result of this automobile accident reveals that there is absolutely no factual basis for this opinion and that it could not be based upon reasonable medical certitude. Therefore, it must be disregarded as not sufficient in law and in fact to

support a verdict in favor of the male plaintiff. See *Campbell v. American Foreign S. S. Co.* (C.C.A. 2d 1941) 116 F.2d 926.

II.

There is no question that when compared with verdicts of other jurisdictions for the same or similar injuries the verdict in this case is grossly excessive, and an appellate Court may reverse a judgment on a verdict when an examination of the evidence reveals that the verdict was grossly excessive and against the weight of the evidence. *Jokelson v. Allied Stores,* 295 N.Y.S. 2d 730 (1968).

The only testimony regarding the nature and extent of the wrist injury that the male plaintiff received was that of the male plaintiff himself. He testified that he had some pain and discomfort following the accident; he further testified that his wrist was operated on for a removal of a ganglion and that this operation was, in effect, a minor one for he was conscious at all times and merely received a local anesthetic to his right arm. Following the surgery his wrist was in a cast for six weeks and that following the removal of the cast his arm was stiff for a while and that the stiffness wore off and that his only present complaints are episodes of soreness every three or five months.

There is no medical testimony and there is no showing based upon reasonable medical certitude that the surgery and subsequent six weeks in the cast had anything to do with any injuries alleged to have occurred in this accident. Therefore, the jury could not consider this item, but even considering this, the verdict is still grossly excessive. The plaintiff testified that he is not disabled in any manner from performing any of the fuctions of his profession or engaging in any activities that he had enjoyed prior to the accident, with the exception of playing basketball.

Dr. Engh diagnosed the injury as being a strain to the triangular disc. There is no medical testimony that the plaintiff sustained any other injury. Certainly a verdict of $25,000.00 for pain, suffering and mental anguish resulting from a strained wrist that has not physically impaired the plaintiff is completely out of proportion to the injury sustained, and it, therefore, can only be inferred that this excessive verdict was the result of pity and sympathy for the plaintiff and prejudice against the defendant. *Snowden v. Matthews* (C.C.A. 9th 1947) 163 F.2d 453.

With respect to the verdict in favor of the female plaintiff in the sum of $5,000.00 for loss of consortium, it is urged that this verdict was also grossly excessive and as a result of pity and sympathy for the female plaintiff and prejudice against the defendant. Certainly there is no evidence to support any finding of damages to the female plaintiff in that sum. The only period of time in which she was deprived of the consortium and society of the male plaintiff was during the time when his wrist was operated on and he was in a cast and, as has been previously stated, there is no medical testimony based upon reasonable medical certitude that this condition and period of disability was occasioned by any injury that resulted from this automobile accident, and even if we engaged in speculation, as the jury did, certainly the sum of $5,000.00 to compensate her for this minimal loss is all out of proportion to any damage or injury that the marital relationship suffered.

III.

The verdict was the result of prejudice against this defendant which initiated when it was suggested to the jury panel during voir dire that the defendant had made an offer to settle this case which the plaintiffs refused to accept, and fuel was added to the fire of prejudice when during closing argument counsel for the plaintiffs suggested to the jury that $3,000.00 a year would compensate the

male plaintiff for "two years of extreme pain" and $1,000.00 a year compensation "for being deprived of all the simple joys of his children, of all the simple joys of just going about doing the ordinary things" and $500.00 a year compensation "for all future pain and suffering". As far as the jury was concerned, it is apparent that they felt that the defendant admitted liability when he offered to settle, as was suggested on voir dire. Therefore, they apparently felt that the only remaining issue was the determination of the amount of damages.

The cumulative effect of the comments of counsel for the plaintiffs on voir dire, and during closing argument, effectively prejudiced the jury against the defendant and aroused sympathy for the plaintiffs, and this is amply demonstrated in an unconscionable verdict of $25,000.00 to the male plaintiff for a strained wrist and $5,000.00 to the female plaintiff for a couple of months of being unable to squeeze her bridegroom's hand in the movies. See *Klotz v. Sears, Roebuck and Company* (C.C.A. 7th 1959) 267 F.2d 53; *Preston v. Mutual Life Insurance Company* (C.C.D. Mass. 1895) 71 F. 467, 67 ALR 2d 560.

CONCLUSION

It is urged that the trial Court erred in refusing to impanel a new jury panel at the outset of the trial and further erred in denying the defendant's motion for a new trial on the grounds that the verdict was not supported by legally sufficient evidence, was contrary to the evidence on the issue of the proximate cause of the damages alleged, was grossly excessive and the result of pity and sympathy for the plaintiffs and prejudice against the defendant provoked by the improper remarks on voir dire and during closing argument by counsel for the plaintiffs.

It is respectfully urged that the case be remanded for a new trial on the issue of damages.

Patrick J. Attridge
Attorney for Appellant

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES B. JONES and RITA J. JONES Plaintiffs v. JOHN D. NEWTON *SERVE:* Director of Vehicles and Traffic, Washington D. C. Defendant	)	C.A. No. 2409-67

COMPLAINT
(Personal Injuries)

Claim of Charles B. Jones

1. The amount in controversy herein exceeds the sum of $10,000.00, exclusive of interest and costs.

2. On or about September 25, 1965, the Plaintiff, Charles B. Jones, was operating an automobile in an easterly direction at Scott Circle, N.W., in the District of Columbia.

3. At said time and place, the Defendant, John D. Newton, was operating a vehicle also in an easterly direction at Scott Circle, N.W., in the District of Columbia.

4. The Defendant, John D. Newton, was the owner of the vehicle which he was operating.

5. The Defendant, John D. Newton, in violation of the Motor Vehicle and Traffic Regulations for the District of Columbia, then and there in force and effect, negligently and carelessly maintained,

managed, controlled and operated said vehicle whereby it was caused to strike and collide with the rear of the vehicle operated by the Plaintiff, Charles B. Jones.

6. As a direct result of the carelessness and negligence aforesaid, the Plaintiff, Charles B. Jones, suffered serious and permanent injuries, including among other things, injuries to his right wrist, a strain on his back, injuries to his head, body and limbs, a severe and permanent shock to his nervous system, and has suffered, and will in the future, suffer great physical pain and mental anguish.

7. As a direct result of the injuries suffered by the Plaintiff, Charles B. Jones, he has incurred property damage, and has incurred, and will in the future incur, a loss of time from his employment, and has been and will in the future be, unable to engage in social activities.

WHEREFORE, the Plaintiff, Charles B. Jones, demands judgment against the Defendant, John D. Newton, in the sum of $75,000.00 plus interest and costs.

Claim of Rita J. Jones

8. The Plaintiff, Rita J. Jones, is the wife of the Plaintiff, Charles B. Jones.

9. The Plaintiff, Rita J. Jones, hereby adopts and incorporates herein by reference paragraphs 1 through 7 inclusive of her husband's claim.

10. As a direct result of the injuries suffered by her husband, Charles B. Jones, the Plaintiff, Rita J. Jones, has suffered a loss of consortium of her husband, Charles B. Jones.

WHEREFORE, the Plaintiff, Rita J. Jones, demands judgment against the Defendant, John D. Newton, in the sum of $15,000.00, plus interest and costs.

/s/ David Kayson
Attorney for Plaintiff

DEMAND FOR JURY TRIAL

The Plaintiffs demand a jury trial on all the issues herein.

/s/ David Kayson
Attorney for Plaintiff

ANSWER TO COMPLAINT

Comes now the defendant, John D. Newton, by and through his attorneys, and for answer to the complaint filed herein avers as follows:

1. The defendant admits that he was involved in a collison with the plaintiff, Charles B. Jones, on or about September 25, 1965, at or near Scott Circle, in Washington, D. C.

2. The defendant denies each and every other allegation contained in the said complaint.

3. The defendant denies that he was negligent or violated any Traffic Regulations and further denies that the injuries or damages of the plaintiffs were caused by the negligence of Traffice Regulation violations of this defendant, if any.

4. The defendant avers that the injuries or damages of the plaintiff, if any, were caused by the sole and/or contributory negligence of the male plaintiff, Charles B. Jones.

WHEREFORE, the premises considered, the defendant prays that the said complaint be dismissed with costs.

Doherty, Attridge & Doherty

By /s/ Cornelius H. Doherty, Jr.
Attorneys for Defendant

PLAINTIFFS' PRE-TRIAL STATEMENT

Facts:

On September 25, 1965 the Plaintiff, Charles B. Jones, was operating a vehicle in an easterly direction at Scott Circle, N.W., in the District of Columbia.

The Defendant, John D. Newton, was the owner of the vehicle which he was operating at said time and place in an easterly direction at Scott Circle, N.W. The Defendant struck and collided with the Plaintiff's vehicle as a direct result of which the Plaintiff suffered injuries.

Negligence:

1. Failure to give full time and attention. (Sec. 99)
2. Failure to yield the right of way. (Sec. 46)
3. Exceeding the speed limit (Sec. 22)
4. Failure to drive at a reasonable and prudent speed. (Sec. 22)

5. Following too closely. (Sec. 33)

6. Failure to drive at an appropriately reduced speed when approaching an interesection. (Sec. 22)

7. Failure to avoid colliding (Sec. 22)

Injuries:

1. Aggravation of pre-existing low back pain, permanent.

2. Aggravation of right wrist mass.

3. Operation on right wrist.

4. Permanent partial disability of right hand.

5. Pain in right wrist, permanent.

6. The Plaintiff's wife suffered a loss of consortium.

Damages:

Property damage	$275.00
Hospital bill	$119.00
Reasonable value of operation	
Reasonable value of x-rays and laboratory studies	
Reasonable value of anesthesia	
Loss of wages	$320.00

Requested Stipulations:

1. Hospital reports, x-rays and x-ray reports.

2. Motor Vehicle and Traffic Regulations of the District of Columbia.

3. Department of HEW, Life Tables.

/s/ David Kayson
Attorney for Plaintiffs

MOTION FOR A NEW TRIAL

Comes now the defendant, John D. Newton, by and through his attorneys, and moves this Court for an order granting a new trial, and for reasons therefore says:

1. The verdict is contrary to the law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the weight of the evidence.

4. The verdict is not supported by legally sufficient evidence.

5. The verdict is excessive.

6. The verdict was a result of pity and sympathy for the plaintiffs provoked by the plaintiffs' attorney's improper argument.

7. The trial Court erred in not declaring a mis-trial and summoning a new jury panel when during voir dire the jury panel was asked if any member would be prejudiced against the plaintiffs who elected to proceed to trial rather than to accept a settlement offered by a defendant.

8. The trial Court erred in permitting the plaintiff to testify regarding the age and experience of the average Army physician at Walter Reed Army Medical Center.

9. The trial Court erred in permitting the witness to identify and testify concerning the rough notes of the investigating police officer.

10. And for such other and further reasons that may be advanced upon the hearing of this motion.

Doherty, Attridge & Doherty

By /s/ Patrick J. Attridge
Attorneys for Defendant

ORDER

This matter having come before the Court on the Defendant's Motion For a New Trial, which was filed June 13, 1969, and the Court having fully considered said Motion, the Memorandum of Points and Authorities attached thereto, Plaintiff's Opposition to said Motion, the filed and records in the case, and the Court being fully advised in the premises, and it appearing conclusively that the Defendant is entitled to no relief, it is by the Court this ____day of July, 1969:

ORDERED, That the Defendant's Motion for a New Trial be, and the same is hereby, denied.

/s/ Charles F. McLaughlin
Judge

[Filed July 18, 1969]

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,470

CHARLES B. JONES, et al

Appellees

v.

JOHN D. NEWTON

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

David Kayson
Attorney for Appellees

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

STATEMENT OF ISSUES PRESENTED

In the opinion of the Appellee, the following issues are presented:

Where the Appellant did not move for a Directed Verdict may he on appeal question the sufficiency of the evidence.

May the Appellant question the weight of the evidence.

May the Appellant, after a denial of a motion for a new trial on the ground of alleged excessiveness of the judgment, seek review of said judgment.

Whether the Appellant has carried his burden of showing prejudicial error affecting his substantial rights which would require reversal.

COUNTERSTATEMENT OF THE CASE

On voir dire examination by the Plaintiff it was learned that a number of the members of the jury panel had been involved in automobile collisions. In two instances there were settlements made. (T. 5-6) The Plaintiff then inquired into the panel's feelings concerning one's right to file suit and pursue their claim. There was no objection to Plaintiff's questions in this respect. (T. 7) At a later time, when the Defendant objected to voir dire directed to persons having prejudice against drivers of sports cars there was objection to the former question.

The Plaintiff in voir dire learned that several members of the panel could not fairly and impartially consider the facts because the Plaintiff was driving a sports car at the time of the collision. (T. 10) As a result, the Court requested at a bench conference that Plaintiff and Defendant eliminate these members of the panel from selection on the jury and it was so agreed. (T. 12, 13, 15)

The Plaintiff, Charles B. Jones, was called and testified that he was a medical doctor who graduated from medical school in 1961 and entered the United States Army in the same year. (T. 28) While in college in 1955, he slipped on snow and injured his right wrist and a year later a ganglion cyst developed in his wrist. However, this cyst did not affect his ability to use his wrist. (T. 29)

In 1960 he fractured his left leg after which he had some trouble with his back. But his back had not given him any trouble for two years prior to the collision involved herein. (T. 28)

About five weeks before the collison herein, Dr. Jones married the Plaintiff, Rita Jones. (T. 30)

On September 25, 1965, the male Plaintiff was operating his car at Scott Circle and was struck in the rear by a vehicle operated by the Defendant, John D. Newton. As a result of this he injured his back and right wrist. (T. 32)

His wrist became numb after the collision and when he arrived at his destination his wrist became painful and his back became stiff. The male Plaintiff had not had any trouble with his wrist prior to this time other than 10 years before when he fell on it. And he had not had any trouble with his back in over two years. (T. 37)

He thought the pain would go away in a day or two and he soaked his wrist in hot water. However, this treatment did not give him relief and he therefore presented himself for treatment at Walter Reed Hospital, his duty station, on October 5, 1965. (T. 38) The orthopedic surgeon there recommended surgery on the wrist and this was done. The wrist was in a cast for 6 weeks which prevented him from performing his duties at his employment. The cast also prevented him from engaging in his usual leisure time activities including the cessation of golf lessons which he and his wife had undertaken. (T. 40)

After the cast was removed, his wrist was stiff and "any movement" was painful. His back gave him trouble for 6 weeks. (T. 41)

It was 2 months after the removal of the cast that he regained motion and "on several occasions I reinjured my right wrist and the nature of the accident that would cause injury to it would be small—

just a child bumping into the wrist, or if a door swung open with somebody from the other side. On a couple of occasions when my wrist was hanging loose, my wife would grab it to show me something and it would be painful." (T. 42) Each time that his "wrist would be reinjured from small accidental movements it would be sore for another 2 or 3 weeks. During this time my work would become more difficult and I just couldn't play basketball or touch football." He was not able to play golf again until 2 years later in 1967. (T. 43) And he sold his sailboat.

At the time of the trial he was not able to play basketball because, "In basketball you get your hands pushed more than any other sport. I have tried but have ended up with some injury so I don't play at all." And in playing with the neighborhood children, "essentially what I do is guard the wrist. I keep it closer to my body and use the other hand." (T. 44) At the time of the trial he had a daughter 1½ years of age. He testified that he still has pain in his wrist on occasion every 3 or 5 months "if anything bends the wrist beyond the present limit of its motion then it will be painful depending on how hard the injury was—maybe a couple of weeks or a couple of days."

In February of 1969 he had difficulty with his wrist when he fell on snow and it was sore for about 3 weeks. He had not had a painful wrist from a fall other than the fall in 1955. (T. 46)

On cross-examination, the male Plaintiff testified that "My principal difficulty is the fear of re-injuring the right wrist." (T. 63)

On re-direct, the male Plaintiff was asked about the "re-injuries" referred to by the Defendant on cross-examination. He said, "These were very minor things that would re-injure my wrist, which to the normal wrist would produce no pain or symptoms or any problems at all." (T. 64)

He also stated that he would not get involved in any activity where he would hurt his wrist. He would not roughhouse with children, play touch football and guards his wrist at social functions because he knows that any extensive force to the wrist will end up hurting him for 2 or 3 weeks. However, he does not guard his other wrist and completely forgets about it. (T. 70)

Before the collision herein a door swinging back hitting his hand; his wife grabbing his wrist to get his attention or playing with neighborhood children did not produce "any pain at all." (T. 65, 66) He guards his wrist at social functions but completely forgets about his left wrist. (T. 70)

At a bench conference, the Plaintiffs advised the Court that Plaintiffs' counsel had been in touch with the police officer who had investigated the collision. That he was out of town, that he was no longer with the police department and not subject to subpoena. Counsel advised the Court that, as an alternative, the Plaintiffs had subpoenaed the police department records of the collision. (T. 76)

The Plaintiffs called Walter Wiseman, a police officer employed by the Metropolitan Police Department, Traffic Division. He testifield that he was present in conformance to a subpoena requiring the production of all records concerning a collision between the Plaintiff, Charles B. Jones, and the Defendant, John D. Newton, at Scott Circle, on September 25, 1965. He produced the "rough notes" made by the officer on the scene and said notes were introduced into evidence. (T. 80-81)

Subsequently, the Court ruled that the "rough notes" could not be read into evidence. (T. 91)

The Plaintiffs read into evidence without objection the Walter Reed Hospital records showing the history taken of the auto collision, the findings and treatment. (T. 99)

The Plaintiffs called Dr. O. Anderson Engh who testified that he was an orthopedic specialist, and has been practicing for 35 years.

The Defendant offered to stipulate that the doctor was qualified as a specialist. The Plaintiffs declined the offer and the doctor testified to his qualifications. (T. 100)

The doctor testified that the male Plaintiff was examined and that he gave a history of a ganglia on his right wrist which wasn't causing him any trouble until an accident on September 25, 1965. That "following removal of the cyst he continued to have pain in the right wrist." (T. 101) The doctor diagnosed his condition as "a strain involving the right wrist due to involvement of the triangular disc in the wrist joint." (T. 102) and that the condition is permanent. (T. 104) The doctor stated that there was no treatment for this condition, (T. 102) and the reason is that it is difficult to obtain results from surgery. He stated that surgery could be performed but "generally, it is felt that surgery is not satisfactory," (T. 103) and he said, "I can only testify here on my own experience that it has been far from satisfactory." (T. 104)

On re-direct, Dr. Engh testified that the male Plaintiff gave a history of no complaints about his right wrist prior to the automobile collision of September 25, 1965, and the history was that after the said collision "The complaints were pains in the right wrist after the use of his wrist." (T. 119) And the doctor did not inquire as to each type of use which caused him pain. (T. 119). The doctor, after considering the defense examination, did not change his opinion, given on direct examination. (T. 119)

The Defendant did not move to strike the testimony of Dr. Engh.

The Plaintiff, Rita P. J. Jones, testified that she was the wife of the Plaintiff, Charles B. Jones, 31 years of age, had been married for

4 years as of August 14 and the mother of a girl, 20 months of age. She testified that for 2 years prior to her marriage she saw her husband 6 or 7 days a week (T. 123) and they played tennis, golf, sailed and he played with the children in the neighborhood (T. 123, 125). That after the collision herein, her husband could not go sailing, play golf, or play with the children. That in the spring they "went sailing for a few times but if he jerked his hand, the wrong way, it would hurt or if I grabbed it, it hurt—if I took his hand. In the movies, if I just reached over and squeezed his hand, he would have difficulty with it and he does not complain." (T. 125) The injuries suffered by her husband interfered with her marital relations until around Christmas. (T. 127)

It was stipulated that the life expectancy of the male Plaintiff was 39.9 years. (T. 130)

The Plaintiffs rested. (T. 134)

There was no "Motion for a Directed Verdict" by the Defendant.

The Defendant presented his case which consisted only of the testimony of Defendant, John D. Newton.

The Defendant did not call any medical expert for the defense.

The Defendant rested. (T. 157)

The Plaintiff did not have rebuttal. (T. 158)

There was no "Motion for a Directed Verdict" by the Defendant at the close of all of the evidence.

In argument, the Plaintiff referred to the testimony of the Defendant, Newton, that he did want the police called. (T. 167) The Plaintiff asked the Defendant to answer the following question, "If Mr. Newton was in the right why did he not want the police to be there to make a report?"

The Defendant in his argument stated, "Where is the police officer who investigated the accident?" "Where was he yesterday?" "Where is he today?" The Plaintiffs objected to this argument as improper and at a bench conference the Court stated that the Plaintiffs could answer in its argument. (T. 177) After the bench conference the Defendant made further reference to the absence of the police officer. (T. 177)

The Plaintiffs in closing argument stated that the Defendant had inferred in his argument that the collision had not been investigated. The Plaintiffs then made reference to the "rough notes" prepared by the investigating officer and brought to the trial, in conformance with a subpoena, by Officer Wiseman. (T. 195, 196).

The Defendant did not object to this argument.

SUMMARY OF ARGUMENT

I

Where a party does not move for a Directed Verdict the sufficiency of the evidence is not reviewable on appeal.

II

The denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence is not subject to review.

III

An Appellate Court will not review the action of a trial court denying a motion for a new trial on the ground of excessiveness of the verdict.

IV

The Appellant has not carried his burden of showing prejudicial error requiring reversal.

ARGUMENT

I

It is well established that the sufficiency of the evidence is not reviewable on appeal unless a motion for a directed verdict was made in the trial court. *Wells v. Rau,* 129 App. D.C. 253, 393 F.2d 362 (1968). There are sound reasons for this rule. The party who makes no motion for a directed verdict must be of the view that the evidence makes a case for the jury and should not be permitted to impute error to the Court for sharing that view. The Appellate Court, therefore, is powerless to review the sufficiency of the evidence to support the verdict if the appellant made no motion for a directed verdict. *Employers Liability Assurance Corp. v. Lejeune,* 189 F.2d 521 (1951), cert. den. 72 S.Ct. 111, 342 U.S. 869, 96 L.Ed. 653.

Even if a motion for a new trial is made for insufficiency of the evidence, the failure to move for a directed verdict forecloses the question on appeal. A party may not gamble on the verdict and later question the sufficiency of the evidence. *District Hauling and Construction Co., Inc. v. Argerakis,* 34 A.2d 31 (1943); *Woodbridge v. DuPont,* 133 F.2d 904 (1943).

II

The denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence is not subject to review. *United States v. Socony-Vacuum Oil Co.,* 60 S.Ct. 811, 310

U.S. 150, 84 L.Ed. 1129 (1940), rehear. den. 60 S.Ct. 1091, 310 U.S. 658, 84 L.Ed. 1421.

A number of decisions from the courts of appeals are to the same effect. In *Portman v. American Home Products Corp.*, 201 F.2d 847, 848 (1953), Judge Learned Hand said,

> "[T]here may be errors that are not reviewable at all, and among those that are not are erroneous orders granting or denying motions to set aside verdicts on the ground that they are against the weight of the evidence . . . [This] rule is too well established to justify discussion."

In accord is *Contorno v. Flota Mercante Grancolombiana, S.A.*, 278 F.2d 719 (1960), and *Fischer v. U.S.*, 318 F.2d 417 (1963).

There are casual phrases in some court of appeals decisions which imply a power to reverse for clear abuse of discretion. However, the Seventh Amendment, prohibiting re-examination of any "fact tried by jury . . . than according to the rules of the common law" stands squarely in the way. *Barron & Holtzoff, Wright edition*, Vol 3, pp. 353-354.

In any event, the verdict is supported by ample evidence of a clear and convincing nature that the male Plaintiff suffered severe and permanent injuries as a result of the collision herein.

The male Plaintiff testified to having injured his right wrist 10 years prior to this collision and the subsequent development of a ganglion on his wrist. However, the use of his right wrist did not cause him any pain or discomfort. He also had some years previously broken a leg which resulted in back trouble but he had not had any back pain for 2 years prior to the collision herein. As a result of the collision herein he was thrown about in his vehicle and twisted his right wrist and back resulting in pain in the wrist and stiffness

in the back within several hours of the collision. He treated his wrist himself and when this did not relieve the pain he presented himself for treatment at Walter Reed Hospital where he was stationed.

The medical records from Walter Reed dated October 5, 1965, stated that he had a chronic low back pain with the last orthopedic evaluation 2 years prior and pain was aggravated by an auto accident 10 days ago. It also noted a right wrist mass "aggravated by trauma and flexing of wrist." The second portion of the record stated that he had been involved in a collision 6 weeks ago and since that time had intermittent tenderness and "pain in the right wrist especially on flexing." It also noted that he was admitted for gangliectomy, the surgical removal of the ganglion. These records corroborated the male Plaintiff's testimony that the pain in his back and right wrist developed after the collision herein. The Plaintiff's testimony together with the records show the causal relationship. It is undisputed that the plaintiff was operated upon and was in a cast for 6 weeks with disability in his wrist for a time thereafter.

The Plaintiff's medical witness, Dr. O. Anderson Engh, testified that the history he obtained from the Plaintiff was that of having a pre-existing mass on his right wrist before the collision herein which did not cause him pain but that after the collision his wrist was painful on use. And that the pre-existing ganglion was removed but he continued to have pain in the wrist. Dr. Engh testified to the examination he gave the Plaintiff and that his diagnosis was a strain of the wrist involving the triangular disc in the wrist joint. He testified that this condition was causally related to the collision and was permanent. He testified further that if the Plaintiff continued to have trouble with his wrist that the treatment would be an operation. However, in his experience operations for this condition would not have a satisfactory result.

On direct examination, cross examination and redirect examination the doctor fully and comprehensively covered his diagnosis, the basis on which he made the diagnosis and the reasons for his statement that the treatment of an operation is not satisfactory. Thus, Dr. Engh's testimony is supported by ample facts. Not having made a motion to strike this evidence, nor a motion for directed verdict on the ground of insufficiency of the evidence nor even introducing contradictory medical evidence in his own case, the Defendant now argues that the doctor's testimony is insufficient to support a jury finding. The Defendant has not shown one single fact to support this argument.

The Defendant contends that Dr. Engh testified that the surgery was not the result of the collision. There is no such testimony by Dr. Engh. Dr. Engh testified that the injury sustained by the male Plaintiff was a strain of the wrist involving the triangular disc and that there was no aggravation of the ganglion. The effect of this testimony is that the diagnosis at Walter Reed was incorrect and therefore, the operation was unnecessary.

However, even though the Walter Reed physician may not have made the correct diagnosis and performed surgery which was not necessary causing incapacitation and damages to the plaintiff, the defendant is liable for these damages. Dr. Engh did not say, as the Defendant contends, that the surgery was not a result of the collision. The evidence, without contradiction, shows that after going to Walter Reed for treatment for the pain in his wrist he was admitted and the ganglion was excised. However, the defendant cannot use this improper treatment and resultant disability against the plaintiff and to the Defendant's advantage. The general rule is, that an injured party can recover from the original tort-feasor for damage caused by the negligence of a physician in treating the injury which the tort-feasor caused, provided the injured party used reasonable

care in selecting a doctor. *Edwards v. Georgen,* 256 F.2d 542 (1958) 100 ALR 2d 804. And the Plaintiff certainly used reasonable care in presenting himself at Walter Reed Medical Center for treatment.

The Defendant argues that the Plaintiff is bound by one of his witness' testimony as against another witness' testimony. This is not the law even where the Plaintiff's own testimony tends to defeat his own case. *Alamo v. Del Rosario,* 69 App. D.C. 47, 98 F.2d 328 (1938). In *Diggs v. Lail,* 201 Va. 871, 114 SE2d 743 (1960), 53 ALR 2d 1229, a case where two medical witnesses for the Plaintiff were in conflict, the Court said, "It frequently happens that witnesses testifying for a party may give conflicting evidence with respect to a material issue at the trial. In such situations it is for the jury to say which witness, other than the litigant himself, they will believe and what testimony they will accept. Such is the situation here." And so in the instant case the jury was free to accept the testimony of Dr. Engh as to diagnosis, causation and permanency.

The Defendant in his argument attempts to take the male Plaintiff's use of the word "re-injury" and torture this into new and different and independent accidents. Then he argues that since Dr. Engh was not told of each and every one of these "re-injuries" that Dr. Engh did not have a complete history. A reading of the male Plaintiff's testimony as a whole clearly demonstrates that he used the word "re-injury" as his manner of expressing the pain in his wrist under the varying situations of using his wrist. As indicated on re-direct examination, the so-called "re-injuries" were "very minor things that would 're-injure' my wrist which to the normal wrist would produce no pain or symptoms at all."

III

The rule is settled in Federal Courts that an appellate court will not reverse a judgment on account of the size of the verdict. *Washington Times Co. v. Bonner,* 66 App.D.C. 280, 86 F.2d 836 (1936). The Court in this case quotes Justice Brandeis in *Fairmount Glass Works v. Coal Co.,* 287 U.S. 474, 53 S.Ct. 252, 77 L.Ed. 439 (1933) where he said at page 481 "The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was the damages awarded by the jury were excessive . . . The rule precludes likewise a review of such action by a circuit court of appeals."

In any event, considered and logical analysis of the verdict will clearly demonstrate that it is no more than fair compensation for the impact which the injuries have had, and will have, on the life of this young couple.

The wife testified to the various recreational activities in which they engaged before this collision and their inability to engage in them after the collision. She testified to the fact of only having been married some five (5) weeks when this collision caused certain injuries and the resulting treatments which caused an interruption to their marital relations until about Christmas. The injuries caused them to give up the golf lessons which they had started prior to their marriage. It was two years before they could resume playing golf. They sailed on only one occasion after the collision but because of the difficulty her husband experienced in the use of his right wrist this activity was not engaged in again. He thereafter sold his sailboat. Further, the evidence was that the simple act of taking hold of her husband's hand in the movies caused him pain.

The jury found as a matter of fact that the damages suffered by this 27 year old wife commencing five weeks after her marriage was in the amount of $5,000.00.

By the same token, the husband's being deprived of the love, affection, marital relations and companionship of his wife has resulted in damages to him in the amount of $5,000.00.

Deducting this $5,000.00 from the husband's award of $25,000.00 leaves a balance of only $20,000.00 as compensation for all of the husband's future pain, suffering and disablement from the enjoyment of a full life. Even the attendance at social gatherings is marred by the anxiety of potential injury to his wrist in shaking hands with people.

When this sum of $20,000.00 is considered in relation to his 39.9 years of life expectancy it is evident that he has been awarded only $500.00 per year for his future pain, suffering and disability.

IV

Examination of jurors on their voir dire is largely a matter resting in the sound discretion of the trial Court; and that discretion ought not to be revised by an appellate tribunal, unless for manifest and palpable error injurious to the appellant. (*Reynolds v. U.S.* 98 U.S. 145.) *Howgate v. U.S.*, 7 App.D.C. 217 (1895). In the recent case of *Parks v. Ratcliff*, 240 A.2d 659 (D.C. Ct. App. 1965) the Court said at page 661, "Today many more people own automobiles and many more people carry liability insurance. This is a matter of common knowledge. We think it may fairly be assumed that the average juror in an automobile negligence case suspects that the Defendant has liability insurance and that the case in fact is being defended by an insurance company."

It is also a matter of common knowledge that defendants make offers of settlement where liability is denied. In the instant case, several of the jurors settled their claims arising out of collisions. These persons could very well have had feelings that if they were able to settle their cases other claimants should be able to do the same without coming into courts which are already overcrowded with backlogs of cases. The members of the jury panel who held this or similar views would be prejudiced against the plaintiffs. It was, therefore, necessary to determine whether any of the panel held such views.

In *Brusie v. Peck Bros. & Co.*, 42 N.Y. SR 801, 16 NYS 648 (1891, Sup) the Plaintiffs counsel in opening his case to the jury remarked that "after the lapse of 14 years the Defendant made an offer of settlement" to which remark the Defendant objected. It was held that while the remark was improper and counsel for the Plaintiff had no right to prove the offer, it was not an error which would justify the reversal of the judgment for the Plaintiff.

In the Plaintiff's closing argument to the jury for money damages the request was made only for fair and reasonable compensation. There were several references to the money damages and in each instance the request was for fair and reasonable compensation and the jury was told that the determination as to what constituted fair and reasonable compensation was in their sole discretion. The Plaintiffs posed the query to the jury as to what amount would compensate the Plaintiffs for their injuries and for illustrative purposes used the figures $3,000.00, $1,000.00 or $500.00. This was followed by the statement that it was for the jury to decide what is fair and reasonable compensation. This type of argument has been approved in *Evening Star Newspaper Co. v. Gray*, 179 A.2d 377 (Mun. Ct. D.C. 1962).

The Defendant in support of his argument that the Plaintiff's closing argument was prejudicial cites *Klotz v. Sears Roebuck & Co.* 267 F.2d 53 (1959). In that case the Plaintiff twice entreated the jurors to "do unto others as you would have them do unto you." In the instant case the Plaintiffs made no such statement and in each instance requested only fair and reasonable compensation which the jury was told was in their sole discretion to determine.

Nor is the case of *Preston v. Mutual Life Insurance Co.* 71 F.2d 467, 67 ALR 2d 560 applicable to this case. That case was a suit on an insurance policy where the company defended on the ground of suicide and introduced into evidence a paper tending to support its position. In argument, Plaintiff's counsel argued that the paper was written much before the date of death and then Plaintiffs counsel produced a magnifying glass and read the name of a person from the paper. This name was not in evidence and the Defendant did not have an opportunity to contradict the statement. The Court considered this a material issue. In the instant case the Plaintiffs in closing argument asked the Defendant to answer the following question "If Mr. Newton was in the right, why did he not want the police to be there to make a report?" When the Defendant, having previously learned at a bench conference why the policeman was absent, argued "Where is the police officer who investigated the accident?" he opened the door to the reference to the "rough notes." The evidence showed that these "rough notes" had been made by the investigating officer. The Plaintiffs in closing argument reminded the jury of the evidence concerning the rough notes and the fact that the evidence was that they were made by the officer who investigated the accident. Counsel for Plaintiffs did not read anything from these "rough notes" as was done in the *Preston* case. Thus, there was no evidence of what these notes contained.

An appellate court has the duty to give judgment after examination of the entire record without regard to technical errors or de-

fects which do not affect substantial rights of the parties. *District of Columbia v. Chessin,* 61 App. D.C. 260, 61 F.2d 523 (1932). As was said in *Sher v. De Haven,* 91 App. D.C. 257, 199 F.2d 77 (1952) cert. den. 345 U.S. 936, 97 L.Ed. 1363, 73 S.Ct. 979 at page 261, "It is well to remember that mere 'technical errors' which do not affect the substantial rights of the parties are not sufficient to set aside a jury verdict in an appellate court;" and that "He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." *Palmer v. Hoffman,* 318 U.S. 109, 116, 63 S.Ct. 477, 482, 87 L.Ed. 645."

CONCLUSION

A consideration of the record as a whole demonstrates that the verdict of the jury was supported by ample evidence. It further shows that the Plaintiffs did not make any statements or arguments which served in any respect to create prejudice against the Defendant. There is no evidence of any passion or prejudice on the part of the jury. The case was tried without any elements of histrionics. All witnesses including the two Plaintiffs, gave their testimony in a frank, straight forward, calm and deliberate fashion, without any attempt at dramatization or exaggeration. The Defendant has not shown, nor does he even allege, otherwise.

Therefore, the Defendant has not shown the prejudice affecting his substantial rights which requires reversal.

It is respectfully urged that the jury verdict returned herein be affirmed.

Respectfully submitted,

DAVID KAYSON
Attorney for Appellees

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES B. JONES, et al Plaintiff v. JOHN D. NEWTON Defendant	))))))	C.A. No. 2409-67

PLAINTIFFS' OPPOSITION TO MOTION FOR A NEW TRIAL

Come now the Plaintiffs, Charles B. Jones and Rita J. Jones, by and through counsel, and oppose Defendant's Motion For a New Trial and for reasons therefore state:

1. The verdict is not contrary to the law.

2. The verdict is not contrary to the evidence.

3. The verdict is not contrary to the weight of the evidence.

4. The verdict is supported by legally sufficient evidence.

5. The verdict is not excessive.

6. The verdict was not a result of pity and sympathy and the Plaintiffs' attorney's argument was proper.

7. The Honorable Court did not err in not declaring a mistrial during voir dire when counsel attempted to determine any prejudice of the jury panel where a claimant desires to litigate his claim.

8. The Honorable Court did not err in permitting the Plaintiff to testify concerning the age and experience of the orthopedic surgeon at Walter Reed Army Medical Center.

9. The Honorable Court did not err in permitting a witness to identify rough notes of the collision in question which were made by the officer who investigated the collision.

10. The Plaintiffs incorporate herein and make a part hereof the Transcript of Dr. O. Anderson Engh's testimony attached hereto.

11. And for such other and further reasons as may be urged at the hearing of this Opposition.

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